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IN THE

Supreme Court of the United States

October Term, 1957.

No. ~~1140~~ 2nd

EMIL WENTZ and WILLIAM BERING JENSEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition for Writ of Certiorari, to the United States Courts of Appeals, for the Ninth Circuit.

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SUBJECT INDEX

PAGE

I.

Summary statement of the matter involved 1

II.

Jurisdictional statement 3

III.

Questions presented 3

IV.

Statute involved 4

Appendices:

Appendix A:

Opinion of the United States Court of Appeals for the Ninth Circuit ..... App. p. 1

Appendix B:

Judgment ..... App. p. 10

Order Denying Petition for Rehearing ..... App. p. 10

Order Submitting Motion to Restore Appellants to Bail Status ..... App. p. 11

Order Directing Filing of Opinion ..... App. p. 11

Opinion of the United States Court of Appeals for the Ninth Circuit ..... App. p. 12

Certificate of Clerk, U. S. Court of Appeals for the Ninth Circuit, to Record Certified Under Rule 21 of the Revised Rules of the Supreme Court of the United States ..... App. p. 14

TABLE OF AUTHORITIES CITED

CASES — PAGE

Caywood v. United States, 232 F. 2d 220 7

Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371, 84 L. Ed. 329 6

Morris v. United States, 156 F. 2d 525, 169 A. L. R. 305 9

Screws v. United States, 325 U. S. 91, 89 L. Ed. 1495 9

Texas & New Orleans Railroad Co. v. Sabine Tram Company, 227 U. S. 111 6

RULES

Federal Rules of Criminal Procedure, Rule 30 8

STATUTES

Communications Act of 1934, Sec. 3 (48 Stat. 1064) 4

Communications Act Amendments of 1952 (66 Stat. 711, 722) ... 4

Communications Act Amendments of 1952, Sec. 18(a) (66 Stat. 722) 9

Constitution of the United States of America (U. S. Govt. Print. Office, 1953) 10

Public Law 688 (July 11, 1956) 12

United States Code, Title 18, Sec. 1343 ..... 1, 4, 7, 9, 12

United States Code, Title 28, Sec. 1254 3

United States Code, Title 47, Sec. 152 3

United States Code, Title 47, Sec. 153(f) 6

United States Constitution, Art. I, Sec. 8, Cl. 3 9

MISCELLANEOUS

United States Code Congressional and Administrative News, No. 13, August 5, 1956, p. 3815 12

United States Code Congressional and Administrative News, No. 13, August 5, 1956, p. 4106 ..... 10, 12

IN THE

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EMIL WENTZ and WILLIAM BERING JENSEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition for Writ of Certiorari, to the United States Courts of Appeals, for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice, of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

I.

Summary Statement of the Matter Involved.

An indictment was filed in the United States District Court, Southern District of California, Central Division, on April 25, 1956, alleging a violation of Title 18, Section 1343, United States Code, Fraud by Interstate Wire. The allegations therein contain statements that appellants devised and intended to devise a scheme to defraud alleged victims and to obtain money from them by means of false and fraudulent pretenses, known to be false and fraudulent

when made; that, for the purpose of executing the scheme and artifice, the defendants caused to be transmitted by interstate and foreign wire a signal and sound from the city and county of Los Angeles, California, within the Central Division of the Southern District of California, to Dallas, Texas, thence to San Antonio, Texas, and thence to Mexico, District Federal, Republic of Mexico. After conviction in the District Court, the matter was appealed to the Court of Appeals for the Ninth Circuit, which court affirmed the decision of the District Court. A petition for rehearing in the Court of Appeals was denied. Pending action on the petition for rehearing, appellants were, on *ex parte* motion by counsel for the Government, remanded to custody and appellants' motion to be restored to bail was denied by the Court of Appeals, whereupon this petition for writ of certiorari is sought.

The matter was reported in the United States Court of Appeals for the Ninth Circuit in a written opinion numbered 15248 and filed on April 19, 1957. On petition for rehearing, a rehearing was denied by that court on May 31, 1957. On June 5, 1957, in a written opinion, the Court of Appeals denied appellants' motion for restoration to bail status. The opinions of the lower court to which reference was made are appended hereto.

The date and time of the entry of the judgment of the Court of Appeals sought to be reviewed is April 19, 1957. The date of denial of the appellants' petition for rehearing in the Court of Appeals is May 31, 1957.

II.

Jurisdictional Statement.

The statutory provisions believed to sustain the jurisdiction of this court is Section 1254 of Title 28 of the United States Code. The date of the judgment sought to be reviewed by certiorari is May 31, 1957, and the date of this application for certiorari is the 27th day of June, 1957.

III.

Questions Presented.

The questions presented for review expressed in the terms and circumstances of the case are:

1. Is a telegram sent by one person in Los Angeles, California, and addressed to another person in the Republic of Mexico an interstate communication within the meaning of the Communications Act Amendments of 1952 by reason of the fact that it crosses state lines after it leaves its point of origin in the United States and before it arrives at its destination in the Republic of Mexico?

2. Did the trial court commit reversible error in refusing to instruct the jury as to definitions pertaining to communications by wire as found in the 1952 Communications Act Amendments, Section 152 of Title 47, United States Code, and with particular reference to the definitions therein contained of interstate and foreign communications or transmissions.

IV.

Statute Involved.

The statute which the case involves is Title 18, United States Code, Section 1343:

> "§1343. Fraud by wire, radio or television.
>
> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of interstate wire, radio, or television communication, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

The section first appears in the 1952 Communications Act Amendments. See 66 Stat. 711 at 722.

Having its roots in the Communications Act of 1934 (48 Stat. 1064) one must be concerned with the definitions therein contained:

> "Sec. 3. For the purposes of this Act, unless the context otherwise requires—
>
> "(a) 'Wire communication' or 'communication by wire' means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things the receipt, forwarding, and delivery of communications) incidental to such transmission.
>
> * * * * * * * *

"(e) 'Interstate communications' or 'interstate transmission' means communication or transmission (1) from any State, Territory, or possession of the United States (other than the Philippine Islands and the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Philippine Islands and the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Philippine Islands or the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not include wire communications between points within the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

"(f) 'Foreign communication' or 'foreign transmission' means communication or transmission from or to any place in the United States to or from a foreign country, or between a station in the United States and a mobile station located outside the United States."

V.

Appellants were indicted and convicted as a consequence of an alleged fraudulent scheme pertaining to a fixed horse race. The alleged solicitation was to put up good faith or guarantee money, whereupon the alleged victims lost Twenty-four Thousand Dollars ($24,000.00). The real matter for consideration here is the telegram dispatched from Los Angeles and addressed to Mexico City. The telegram crossed state lines in its routing from its point of origin at Los Angeles to its destination in Mexico City.

Appellants' position that the communication was a foreign one is best illustrated by reference to the Supreme Court Opinion in the case of *Texas & New Orleans Railroad Co. v. Sabine Tram Company*, 227 U. S. 111, at page 126, wherein the court states:

> "The determining circumstance is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. It was to supply the demands of foreign countries that the lumber was purchased, manufactured and shipped, and to give it a various character by the steps in its transportation would be extremely artificial. Once admit the principle and means will be afforded of evading the national control of foreign commerce from points in the interior of a state. There must be transshipment at the seaboard, and if that may be made the point of ultimate destination by the devise of separate bills of lading the commerce will be given local character, though it be essentially foreign."

> "Courts of the United States are of limited jurisdiction, possessing only such powers as are either expressly or by necessary implication conferred upon them. There is no presumption in favor of their jurisdiction."

> *Chicot County Drainage District v. Baxter State Bank*, 308 U. S. 371, 84 L. Ed. 329.

Since the telegram, which is the only means by which the court below acquired jurisdiction to hear and determine the questions presented by the indictment, on its face recites that it originated at Los Angeles and was transmitted to Mexico City, the definition in Title 47, United States Code, Section 153, subsection (f) applies. The plain lan-

guage thereof requires the conclusion that the wire did not bring the charge within the purview of 18 United States Code, Section 1343.

Title 18, United States Code, Section 1343, Fraud by Wire, being a part of the 1952 Communications Act Amendments, must necessarily be construed in the light of other pertinent portions of the 1952 Communications Act Amendments. The indictment herein alleged a scheme to defraud. It is the last paragraph thereof which must be construed as written, in the light of Communications Act Amendments of 1952. It alleges, as follows:

> "On or about November 22, 1955, defendants . . . for the purpose of executing the aforesaid scheme and artifice, caused to be transmitted by means of interstate and foreign wire a signal and sound from the city and county of Los Angeles, California, within the Central Division of the Southern District of California, to Dallas, Texas, thence to San Antonio, Texas, and thence to Mexico, District Federal, Republic of Mexico. . . ."

The function of the court is to construe the indictment as written. See:

Caywood v. United States, 232 F. 2d 220, at page 231.

Under the Communications Act, Amendments of 1952, and specifically the definition therein of "foreign communication" or "foreign transmission," the gravamen of the offense alleged would be a communication or transmission from Los Angeles, California, to Mexico City, Mexico. The very definition fits squarely with the case at bar, namely, communication or transmission from any place in the United States, to-wit, Los Angeles, California, to a foreign country, to-wit, the Republic of Mexico.

Government counsel argues, in paragraph two, page 14 of his brief, that the words "and foreign" are descriptive only, do not constitute a necessary part of the indictment, and could have been wholly omitted without doing violence to the statement of the offense. In the light of the definition given by Congress in the Communications Act, Amendments of 1952; it would appear proper to assert that the definition itself, when applied to the indictment, eliminates the notion of interstate communication or interstate transmission and, therefore, the term "interstate" could and should have been wholly omitted therefrom.

Whether or not the chain of transmission was broken was a question of fact and should have been submitted to the jury under proper instructions.

Appellants requested instructions which would have permitted the jury to determine this question. The court refused to give the requested instructions to the jury. Appellants made timely objection to the refusal to charge as requested, giving the grounds for the objections before the jury retired. Rule 30 of the Rules of Criminal Procedure was complied with.

By enacting the Communications Act of 1934 and the 1952 Amendments thereto, Congress had prescribed the standards upon which the guilt or innocence of the appellants were to be determined. It was the duty of the court to provide the jury with instructions which would set out the standards to be applied in the present case. This the court refused to do. Defendants' proposed instruction number 2 was refused by the lower court. The court below gave Government's proposed instruction number 10, as follows:

"A telegram is sent by means of interstate wire as those words are used in the statute and in the indict-

ment. If sent by a wire which crosses the state lines, whatever may be its destination. . . ."

This instruction given does not comply with the standards set out in the Communications Act, Amendments of 1952.

In *Screws v. United States* (1945), 325 U. S. 91, 89 L. Ed. 1495, a conviction was reversed for failure to define the crime charged by reciting the essential ingredients thereof, even though counsel did not except to the trial court's charge to the jury. The court stated:

> "Whatever the degree of guilt, those charged with a federal crime are entitled to be tried by the standards of guilt which congress has prescribed."

In *Morris v. United States* (9 Cir.), 156 F. 2d 525, 169 A. L. R. 305, which was an appeal from a conviction after trial by jury, the court stated:

> "It is our opinion that the trial court committed fatal error in failing to instruct the jury on the statutes and regulations defining and governing the offenses charged against the appellant . . . the court did not define the offense of which the appellant was charged and was being tried and the jury was given no opportunity of applying the facts to the law. . . ."

While the Communications Act defines foreign communication and transmission, Section 18(a) of the Communications Act Amendments, 1952, 66 Stat. 722, 18 U. S. C. 1343, refers only to interstate communications. It was the theory of the government and the lower court that a telegram which crosses state lines is interstate, whatever may be its destination. This is not the law. This theory violates a fundamental concept under the Commerce Clause.

United States Constitution, Art. 1, Sec. 8, Cl. 3.

money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of (interstate) wire, radio or television communication, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than 5 years, or both.'

"Last year a case arose in which it was alleged that the subject in the execution of a scheme to defraud used the telephone, calling from a point in Mexico to Los Angeles, Calif. Because of the limitation in the statute to frauds involving 'interstate' wire, radio, or television communication it was concluded that the telephone call from Mexico, being not an interstate communication but rather a foreign communication, was not covered by the section.

"This case demonstrates the need for amending the statute so that it will reach not only interstate communications but foreign communications as well. If so amended, the statute will cover, for example, telephone calls from Canada made by fraudulent stock promoters to victims residing in the United States. Furthermore, the amendment would remove any doubt as to the applicability of the statute to a communication between a State and a Territory or between a State and the District of Columbia.

"A draft of a bill to accomplish the suggested amendment is enclosed for your consideration and appropriate action.

"The Bureau of the Budget has advised that there is no objection to the submission of this recommendation.

"Sincerely,

.....
Attorney General."

On July 11, 1956, Public Law 688 was enacted by Congress Amending Section 1343 of Title 18, United States Code as follows: Page 3815 of *U. S Code Congressional and Administrative News*, No. 13, August 5, 1956.

> "Section 1343 of title 18, United States Code is amended to read as follows:
>
> §1343. Fraud by wire, radio, or television.
>
> "Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.
>
> "Approved July 11, 1956."

It was stated at page 4106 of *U. S. Code Congressional and Administrative News*, No. 13, August 5, 1956, as follows:

> "This bill is designed to close a loophole in the present law, which limits the prosecution of frauds involving wire, radio, and television communication to interstate transactions only. It would extend this coverage to foreign communication as well."

VI.

The present controversy involves a study of the fundamental distinction between transactions which are interstate in nature and, as such, burdened to some extent by the police power of the state, and those transactions which are by nature in foreign commerce and thereby not subject to state regulation in any of their aspects. The determination of this case involves the determination of a question which is of public importance.

The decision of the Court of Appeals appears to be in conflict with decisions of this court and other Courts of Appeals on the same general subject matter. The Court of Appeals appears to have sanctioned the usurpation by the District Court of a function of Congress in giving its own definition of terms already defined by an act of congress.

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this court, directed to the Court of Appeals for the Ninth Circuit, demanding said court to certify and send to this court a full and complete transcript of the record and the proceedings of the said Court of Appeals had in the case numbered and entitled on its docket No. 15248, *Emil Wentz and William Bering Jensen, appellants, vs. United States of America, appellee*, to the end that this cause may be reviewed and determined by this court, as provided by the statutes of the United States, and that the judgment herein of said Court of Appeals be reviewed by this court. Petitioners further

pray that, pending the disposition of this petition by this court, they may be admitted to bail upon giving bond acording to law in such sum as the court may deem proper, the bond to be approved by the Clerk of said Court of Appeals, for the Ninth Circuit, or otherwise, as this court may direct, and for such further relief as to this court may seem proper.

Respectfully submitted,

JOSEPH T. ENRIGHT,

Attorney for Petitioners.

ANGUS D. MCEACHEN,

Of Counsel.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Emil Wentz and William Bering Jensen, Appellants, vs. United States of America, Appellee. No. 15,248. Apr. 19, 1957.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Stephens, Fee and Chambers, Circuit Judges.

Chambers, Circuit Judge:

Wentz and Jensen[1] were indicted and convicted as a consequence of a fraudulent scheme wherein Frank X. Pommer and Selma H. Pommer were the victims. A federal case was made out of it by adding the charge that "for the purpose of executing the * * * scheme and artifice (the defendants) caused to be transmitted by means of interstate and foreign wire a signal (*i.e.* a Western Union telegram) and sound from the City and County of Los Angeles, California, within the Central Division of the Southern District of California to Dallas, Texas, thence to San Antonio, Texas, and thence to Mexico, District Federal, Republic of Mexico."

The "flim-flam" involved many of the usual facets. A fixed horse race, fantastic winnings. The solicitation to put up "good faith" or guarantee money. Then the victims put up and lose $24,000.

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[1]Indicted with Wentz and Jensen was a third defendant named Schlising who was arrested in Texas with Jensen. Schlising made bail and failed to appear for the trial which began May 21, 1956, in Los Angeles. A severance for Schlising was granted. The trial proceeded as to Wentz and Jensen.

The testimony has been so excised, as was proper, that the only incident for consideration here is the telegram dispatched from Los Angeles and addressed to Mexico City. We do not know how it fitted in to the plan or scheme, or with certainty who actually sent it. But it is conceded that there was adequate testimony to convict the defendants if the telegram's "course" is covered by the applicable statutes.

The accused telegram, omitting Western Union symbols, is:

Los Angeles, Cal.
Nov. 22, 1955

"J. E. Walters
Hotel Reforma
Mexico, D.F., Mexico

"Leaving Wednesday 3:45; arriving Mexico 11:15 P.M.
Love

"Selma"

We assume that "Selma" was the victim Selma Pommer. We suppose the defendants sent the telegram for her or caused her to send it. No point is offered questioning the message as the corpus of the *corpus delicti*.

The telegram went over Western Union lines to Dallas, Texas. There it took tangible form and was retransmitted by Western Union on a wire to its center in San Antonio. There it had a tangible form. From San Antonio it was dispatched by Western Union to Mexico City over a direct wire without interruption. The message again reproduced in tangible form at Mexico City was delivered there by the telegraph agency of the Government of Mexico. The telegraph line from San Antonio to Mexico City is of

some importance. The wire is owned by the Western Union Company from San Antonio to a point on or about the international bridge over the Rio Grande River between Laredo, Texas, and Neuvo Laredo, Mexico. There it connects with a wire of the publicly owned Mexican telegraph agency. The wire runs continuously to Mexico City. The impulses released on the wire by Western Union at San Antonio carry the message to Mexico City without interruption. In Mexico City the message is received and reduced to tangible form.[2] It is not material, but it may be assumed that a message out of Mexico City to Los Angeles would follow the same procedure exactly in reverse. It appears from the record that on such a message as is the focal point here a charge for the service is made by Western Union at Los Angeles. Later the amount is divided upon some accounting basis with the Mexican agency.

The section involved in the indictment, as it read at the time of the alleged offense, was as follows:

"§1343. Fraud by wire, radio or television.

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of interstate wire, radio, or television

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[2] Apparently the electric impulse on the wire from Los Angeles is received by an automatic machine at Dallas which makes a "reperforation" on a tape. (Probably, the first perforation is made by the sending machine in Los Angeles). The reperforation at Dallas is run through another automatic machine which transmits it to San Antonio. It would seem that at San Antonio the message comes in over an automatic machine called a printer. This printer writes out the message that goes into the Western Union files. Also, there is a reperforation at San Antonio which is used for retransmission through another automatic machine to Mexico City.

communication, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

The section first appears in the 1952 Communications Act Amendments, See 66 Stat. 711 at 722.

Having its roots in the Communications Act of 1934 (48 Stat. 1064) one must be concerned with the definitions therein contained:

"Sec. 3. For the purposes of this Act, unless the context otherwise requires—

"(a) 'Wire communication' or 'communication by wire' means the transmission of writings, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things the receipt, forwarding, and delivery of communications) incidental to such transmission.

* * * * * * * * *

"(e) 'Interstate communication' or 'interstate transmission' means communication or transmission (1) from any State, Territory, or possession of the United States (other than the Philippine Islands and the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Philippine Islands and the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Philippine Islands or the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not include wire

communication between points within the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

"(f) 'Foreign communication' or 'foreign transmission' means communication or transmission from or to any place in the United States to or from a foreign country, or between a station in the United States and a mobile station located outside the United States."

From the beginning of their legal troubles these two defendants have persistently and repeatedly asserted that their act was a foreign communication. They say that what they did was not proscribed by the statutes of the United States until 1956[3] when Section 1343, Title 18, was added to read as follows:

"§1343. Fraud by wire, radio, or television.

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

If the addressee had been in San Antonio the defendants necessarily would concede they had offended. They have found a loophole, they believe. And if they have found one, they are entitled to go free. It is not for a court to stretch a statute to cover something not covered.

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[3] A time after the crime, if any, was committed.

A court should not strain either way. It must seek the plain natural meaning as best it can.

The government practically admits that if the message had crossed the California line at San Diego and thence across Mexico into Mexico City then there would be no violation. That would be a foreign communication: a foreign transmission without an interstate aspect. And this court believes such an interpretation was probably correct prior to the 1956 amendments.

Inasmuch as §1343 of the Criminal Code came into being in 1952 as a Communications Act amendment, naturally the definitions of the 1934 Communications Act are germane. The 1952 act proscribes transmission "by means of interstate wire" for the purpose of executing the fraudulent scheme.

It seems clear that Sec. 3(a), *supra*, indicates that more elements may be required for a communication than for a transmission. Communication may imply receipt by the addressee, or at least arrival of the message at the destination. Transmit, we take it, means to send across. And there were really three transmissions of this message: (1) The interstate transmission Los Angeles to Dallas. (2) The retransmission intrastate in Texas from Dallas to San Antonio. (3) The foreign transmission from San Antonio to Mexico City. Therefore, when the message ceased to be an electric signal at Dallas and took on tangible form for retransmission it would appear that the *corpus delicti* of the crime was complete.[4]

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[4] An alternative possible concept is that there was just one transmission from Los Angeles to San Antonio. But the chain of transmission was in any event broken at San Antonio, if not at Dallas. The legal result is the same as if the chain of transmission first broke at Dallas.

It may be argued that this construction cuts across subdivision (e) of Section 3, *supra;* that in "e," when it is said, "'Interstate communication' or 'interstate transmission' means, communication or transmission from any state * * * to any state," necessarily interstate communication and transmission are identical. But this court says Section 3(e) means the same as if it read "interstate communicaion means interstate communication from any state to any other state and interstate transmission means interstate transmission from any state to any other state." We believe that the design of the statute was to proscribe the interstate use of wires. This was done with the message which is the hub of this case.

Defendants bear down heavily on the proposition that foreign commerce is not interstate commerce; *ergo,* a foreign communication which includes interstate aspects is not an interstate communication. They rely heavily on the case of Border Pipe Line Co. v. Federal Power Commission, D. C. Cir., 171 F. 2d 149. There the Border Company operated a natural gas pipeline wholly in Texas. It delivered gas at a point on the Texas side of the border to a Mexican consumer who took the gas on in his own pipeline to Mexico where he used it in his industry. The natural gas act was limited to gas in interstate commerce. Obviously, the Border Company's activities would be hard to drag in under the term interstate commerce. But we do not read that case as reaching the question that would have arisen if the gas had flowed from Texas to New Mexico and thence across to Mexico.

In view of the 1956 amendment to §1343, there may not be too many more cases coming to construe the section as it was adopted in 1952. Many variations of the same

facts under the 1952 act, we do not consider we have reached. Among them: (1) Suppose the Los Angeles operator sent the impulses for the message here over the identical lines (with the same division of ownership of lines and division of service fee) without interruption to Mexico City. (2) Suppose Western Union owned the same line all of the way over the same course and the message was sent interrupted from Los Angeles to Mexico City.

It is a cliche to say that legislation is "inartfully drafted." It does appear, if the defendants' message had had no interstate aspects, that there was an obvious loophole in the statute. But straining neither to hold tight nor to open a gate, it is the court's best judgment that the loophole was not big enough for these defendants. Interstate transmission was proscribed. They had one.

The defendant Jensen has a second point. In the district court he made a timely objection which asserted that the court had no personal jurisdiction over him. Four days after his indictment on May 14, 1956, he moved to dismiss the indictment upon the basis of an affidavit he made and filed. It said: That he was seized and detained in Mexico City on January 17th by Mexican authorities. In Mexico he was at all times denied an attorney. No proceedings were ever held for him in Mexico. He was transported by automobile (by whom not stated) from Mexico City through Nuevo Laredo, Mexico, to Laredo, Texas, where he was turned over to "certain agents of the United States government." Thence he was taken to the United States Commissioner.

As noted, the motion requested the indictment be dismissed because of lack of personal jurisdiction, which lack

purportedly arose out of the events related above. The non sequitur of the motion (dismissal of indictment because no personal jurisdiction yet) we shall ignore. We do, however, believe we should notice that defendant Jensen's counsel misstates the record facts when in his brief he says, "Personal jurisdiction of appellant was acquired by the federal court through the illegal acts of federal officers."

No illegal act of a United States officer is related by Jensen. In the affidavit no action of officers of the United States begins before the defendant is brought to them in the United States. Therefore, the charge, if true, must be that the defendant was denied "due process" in Mexico by Mexicans. If true, that is no legal concern of an American court.

When American officers participate in an abduction from a foreign country (beyond merely receiving a man pushed out of a foreign country) there will then be time to consider whether the forced confession cases relied on by Jensen have some effect on jurisdiction over the person, and, if so, what effect.

The judgments of conviction are affirmed.

(Endorsed:) Opinion. Filed Apr. 19, 1957.

Paul P. O'Brien, Clerk.

APPENDIX B.

United States Court of Appeals for the Ninth Circuit.

Emil Wentz and William Bering Jensen, Appellants, vs. United States of America, Appellee. No. 15248.

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment

Filed and Entered: April 19, 1957

PAUL P. O'BRIEN, Clerk.

United States Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Friday, May 31, 1957.

Before: STEPHENS, FEE and CHAMBERS, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, It Is Ordered, that the petition of Appellants, filed May 18, 1957, and within time allowed therefor by rule of Court for a rehearing of the above cause be, and hereby is denied.

United States Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Tuesday, June 4, 1957.

Before: STEPHENS, CHAMBERS & HAMLEY, Circuit Judges.

ORDER SUBMITTING MOTION TO RESTORE APPELLANTS TO BAIL STATUS

Ordered motion to restore appellants to bail status argued by Mr. Angus D. McEachen, counsel for the Appellants, and by Mr. Louis Lee Abbott, Assistant U. S. Attorney, counsel for the Appellee in opposition thereto, and submitted to the Court for consideration and decision.

United States Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Wednesday, June 5, 1957.

Before: STEPHENS, CHAMBERS and HAMLEY, Circuit Judges.

ORDER DIRECTING FILING OF OPINION

Ordered that the typewritten *per curiam* opinion this day rendered by this Court in above cause on motion to restore appellants to bail be forthwith filed by the Clerk.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

United States Court of Appeals for the Ninth Circuit.

Emil Wentz and William Bering Jensen, Appellants, vs. United States of America, Appellee. No. 15,248. June 5, 1957.

On Motion to Restore Appellants to Bail.

Before: STEPHENS, CHAMBERS and HAMLEY, Circuit Judges.

PER CURIAM:

On April 19, 1957, this court affirmed the conviction of Wentz and Jensen. ..... F. 2d ..... Thereafter, the district court revoked the bail of $20,000 of the appellants, and the marshal holds Wentz and Jensen. The petition for a rehearing was denied on May 31, 1957. There is yet time for certiorari.

The questions of appellants' appeal are not frivolous. If that be all there is to the matter, defendants should continue at large while they seek certiorari.

The very size of the original bail indicates some apprehension of the district court as to the prospective responsiveness of the defendants to orders of the court.

This court cannot warrant its own legal opinion of the defendants' guilt, but it can appreciate that these defendants who play for high stakes now may not feel their case is progressing too well. The district court may well and correctly believe that there is now a danger of

flight of these defendants which was not so great six months ago. It is evident that its latest determination was made on the basis of the presence of an increasing danger of flight, and to the exclusion of any consideration of the merits of the appeal. It says so. This court cannot and should not on this record overturn the district court's ruling. To us it would seem that the district court's concern may be well founded.

The application here is denied. If certiorari should be granted, defendants may renew their application in the appropriate court.

(Endorsed:) *Per Curiam.* Opinion on Motion to Restore Appellants to Bail. Filed June 5, 1957.

Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

Emil Wentz and William Bering Jensen, Appellants, vs. United States of America, Appellee. No. 15248.

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 21 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and thirty-five (135) pages, numbered from and including 1, to and including 135, to be a full, true and correct copy of the entire record, excluding original exhibits, of the above-entitled cause in the said Court of Appeals, made pursuant to request of counsel for the Appellants, and certified under Rule 21 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this twenty-first day of June, 1957.

.....

PAUL P. O'BRIEN, Clerk.